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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1800

FRED WILLIAM QUICK, JR.,
Petitioner

v.

WILLIAM M. HARRIS,
SHERIFF OF NELSON COUNTY
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The Petitioner prays that a Writ of Certiorari issue to review a judgment of the Supreme Court of Virginia entered on March 4, 1974, affirming an order dismissing a Petition for Writ of Habeas Corpus entered by the Circuit Court for Nelson County, Virginia, on October 19, 1972.

Opinion Below

On March 4, 1974 the Supreme Court of Virginia announced in an opinion that there was no reversible error in the judgment of the Circuit Court for Nelson County, thus affirming the judgment of the Circuit Court for Nelson County in this case. The opinion of the Supreme Court of Virginia and the Circuit Court for Nelson County are set forth in the Appendix, *infra*.

Jurisdiction

The judgment of the Supreme Court of Virginia was entered on March 4, 1974. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

Questions Presented

1. Whether it was error to rule that Petitioner, a white male, had no standing to raise the issue of sysytematic exclusion of women from his trial jury in violation of the Constitution of Virginia and the Sixth and Fourteenth Amendments to the Constitution of the United States?

Statement of the Case

On April 14, 1970, Petitioner Quick, a white male, was tried by a Nelson County, Virginia jury for the crimes of statutory burglary and grand larceny. At that time, under Virginia law, any Virginia housewife notified by the jury commissioners that she had been chosen for the master jury list, could advise the jury commissioners that she did not wish to serve and her name would be removed from the master jury list.

Quick was convicted by the jury and sentenced to serve a term of one year in the penitentiary on the charge of statutory burglary and twelve months on the charge of grand larceny, said terms to run consecutively. Quick noted appeal on several grounds not here relevant. His Petition for Writ of Error was denied by the Supreme Court of Virginia on June 15, 1971. Quick filed a Petition for Writ of Certiorari with the Supreme Court of the United States. On April 3, 1972, Quick's Petition for Writ of Certiorari was denied.

Quick then filed a Petition for Writ of Habeas Corpus claiming that the jury that tried him had been unconsti-

tutionally composed primarily in that the Circuit Court for Nelson County and the laws of the Commonwealth of Virginia discriminated against women.

At the time of Quick's trial in 1970, the population of Nelson County was approximately 50% women. The Nelson County jury commissioners for 1970 were all males. Of the grand jurors who indicted Quick, all six were males. Of the jury panel summoned to Quick's trial, only three of the 28 persons were female. Of the twelve jurors who tried Quick all were male. The statistics for the number of males and the number of females on the Nelson County master jury list for 1970-71 are unavailable as the master jury list was *lost* by the Clerk of the Circuit Court for Nelson County.

Quick's Petition for Writ of Habeas Corpus was denied by the Circuit Court for Nelson County. Petitioner Quick then timely filed a Notice of Appeal and Assignment of Error; his Petiition for Appeal was accepted for argument by the Virginia Supreme Court.

On March 4, 1974, in an opinion that is included in the Appendix, the Supreme Court of Virginia found there to be no reversible error in the judgment of the Circuit Court for Nelson County. By this opinion, the Virginia Supreme Court affirmed the judgment of the Nelson County Circuit Court.

On this same date, the Virginia Supreme Court affirmed judgement in the case of *Lawson v. Edwards*, unreported (Va. 1974). A Petition for Writ of Certiorari is filed this day in *Lawson* as well.

REASON FOR GRANTING THE WRIT

Petitioner had standing to raise the issue of sex discrimination in the selection of his trial jury.

The Court below ruled that, as a male, Quick had no standing to raise the issue of systematic exclusion of women from his jury. Petitioner contends that the law is plainly in support of his challenge to the exclusion of women from his jury; thus the lower courts erred in denying him standing.

Central to Petitioner's argument is the case of *Duncan v. Louisiana*, 391 U.S. 145(1968), holding that a trial by jury in serious criminal cases is fundamental to the American scheme of justice, and that the Fourteenth Amendment extends to the citizens of the states the Sixth Amendment guarantee of trial by jury. When the Sixth Amendment was extended in its application to the citizens of the states in *Duncan*, it brought with it the full force of this Court's past Sixth Amendment interpretations. *Johnson v. Louisiana*, 406 U.S. 385(1973). These past decisions serve to interpret and clarify the minimum requirements below which no constitutionally permissible jury may fall.

It is Quick's position that his jury was constitutionally defective in that women had been systematically excluded from participation. A brief review of the holdings of pertinent decisions by this Court supports Plaintiff's contention.

In a successful challenge to the exclusion of women from jury service, this Court held that not only the systematic and intentional exclusion of a racial group, *Smith v. Texas*, 311 U.S. 128(1940), or an economic class, *Thiel v. Southern Pacific*, 388 U.S. 217(1946), but also of one of the sexes, deprives the jury system of the broad

base it was designed to have in our democratic society. *Ballard v. United States*, 329 U.S. 187, 195(1946).

Despite the Court's reliance on its supervisory powers of the federal courts and the resulting absence of a constitutional footing, there can be no doubt about the essential quality attributed by he holding in *Ballard* to women's participation in jury processes. At page 194 of the *Ballard* opinion, the Court suggests that participation by women may be even more important than that of a racial group or economic or social class. ". . . a distinct quality is lost if either sex is excluded. Exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded."

See also the line of cases beginning with *Fernandez v. Texas*, 347 U.S. 475, 477, 478(1954); *Brown v. Allen*, 344 U.S. 443, 474(1953); *In Re: Murchison*, 349 U.S. 133, 136(1955); *Labat v. Bennett*, 365 F.2d 398, *cert. denied* 386 U.S. 991(1967); *Witherspoon v. Illinois*. 391 U.S. 510, 519(1968); *Carter v. Jury Commissioners*, 396 U.S. 320, 322, 333(1970).

But out of these affirmations by the Supreme Court as to the impermissibility of systematic exclusion of racial groups, economic classes, or a sex grew questions of standing. Who had standing to challenge the exclusion of a black person, a working person, or a woman? Must the Petitioner be a member of the excluded group in order to complain and seek redress in the courts?

Ballard v. United States, *supra* settled that women have a right to be tried under a jury system free from discrimination against women, and it has been long settled that the Equal Protection Clause of the Fourteenth Amendment protects blacks from being tried by juries chosen by discriminatory selection procedures against blacks. *Strauder v. West Virginia*, 100 U.S. 303(1880); see also

White v. Crook, 251 F. Supp. 41(M.D. Ala. 1966). But it had been widely held by state and federal courts that a white defendant did not have standing to raise procedural defects that related to jury discrimination against blacks. See *The Defendant's Challenge to a Racial Criterion in Jury Selection: A Study in Standing, Due Process, and Equal Protection*, 74 YALE L. J. 919(1965); *Peters v. Kiff*, 407 U.S. 493, n4(1972). And further it had been argued by many, and upheld in some courts that the Equal Protection Clause of the Fourteenth Amendment protected against racial discrimination but not discrimination based on sex. *Goessart v. Cleary*, 335 U.S. 464(1949); *Miskumas v. Union Carbide Corp.*, 399 F.2d 847(7th Cir. 1968).

Then in June of 1972 this Court ruled that a white state court defendant had an absolute right to trial by a jury selected without racial discrimination against blacks. *Peters v. Kiff*, 407 U.S. 493(1972). The lead opinion of three justices also plainly implies that any criminal defendant would have standing to object to the systematic exclusion of women from his jury:

> Thus, if the Sixth Amendment were applicable here, and Petitioner were challenging a post-*Duncan* petit jury, he would clearly have standing to challenge the systematic exclusion of any identifiable group from jury service.

Peters v. Kiff, supra.

This language butressed by the Supreme Court decision in *Reed v. Reed*, 404 U.S. 71(1971) making it clear that the Equal Protection Clause extends protection to women from discrimination based on sex leads to the inescapable conclusion that a male has standing to raise female exclusion from the jury process. See also *Frontiero v. Richardson*, 411 U.S. 677(1973), and *Cleveland Board of Education v. LaFleur*, 94 S.Ct. 791(1974)

This Court has recently decided the case of *Kahn v. Shevin*, 42 U.S.L.W. 4591 on April 24, 1974, ruling that a Florida statute giving widows, but not widowers a $500 property tax exemption does not unconstitutionally discriminate against widowers on the basis of sex. This holding is distinguished from *Reed*, *Frontiero* and *Cleveland Board of Education*, *supra*, in that Florida was not denying substantive and procedural benefits to one sex and not the other. Further, the challenged Florida statute in *Kahn* is a state tax law. The Court has long recognized that the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.

However, the question has been raised as to whether or not *Peters v. Kiff should* be accorded retroactive effect so as to extend coverage to convictions taking place before its decision date as is true in the instant case.

Retroactivity

Peters v. Kiff plainly falls within that category of cases which should be given retroactive application. This Court has fashioned a rule stating that in cases "where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect." *Williams v. United States*, 401 U.S. 646, 653 (1971); *Adams v. Illinois*, 405 U.S. 278, 280(1972). Nothing is more essential to the reliability of the fact-finding or truth-determining process than a properly selected jury.

In other opinions dealing with retroactivity, the approach mandated by *Linkletter v. Walker*, 381 U.S. 618 (1965) has come to be summarized in terms of a threefold analysis directed at discovery of:

1. the purpose to be served by the new standard,

2. the extent of reliance of law enforcement authorities on old standards, and

3. the effect on administration of justice of retroactive application of the new standards.

Stovall v. Denno. 388 U.S. 293, 297(1967), *Desist v. United States*, 394 U.S. 244, 249(1969). By either the test of *Williams v. United States*, 401 U.S. 646(1971) or *Stovall v. Denno*, 388 U.S. 293, 297(1967), *Peters v. Kiff* is appropriate for retroactive application.

Among the rules that have been held to be appropriate for retroactive application are:

Gideon v. Wainwright, 372 U.S. 335(1963) (right to counsel), held retroactive in *Doughty v. Maxwell*, 376 U.S. 202(1964);

Bruton v. United States, 391 U.S. 123(1968)(right to confront and cross examine witnesses), held retroactive in *Roberts v. Russell*, 392 U.S. 293(1968);

Douglas v. California, 372 U.S. 353(1963)(right to counsel on appeal), held retroactive in *Smith v. Crouse*, 378 U.S. 584(1964);

Mempa v. Rhay, 389 U.S. 128(1970) (right to counsel at sentencing) held retroactive in *McConnell v. Rhay*, 392 U.S. 2(1968);

White v. Maryland, 373 U.S. 59(1963) (right to counsel at preliminary hearings in which substantial rights may be adversely affected), held retroactive in *Arsenault v. Massachusetts*, 393 U.S. 5(1968).

The right to a jury selected without systematic exclusion

on the basis of sex in the instant case rises to at least the level of importance of the above-mentioned rights.

A Case of First Impression

Although the *Peters v. Kiff* decision involved a three, three split among the six majority justices, the plurality lead opinion in *Peters* provides the basis for the result Petitioner seeks here. This Court is facing squarely for the first time the question of whether a male Defendant may challenge the systematic exclusion of women from his or her jury. This case also presents the larger question of whether any Defendant may challenge the systematic exclusion of any identifiable group from his or her jury.

Petitioner contends that the state cannot subject him to a jury that is plainly illegal and give him no recourse. Just as this court had never before considered a white defendant's challenge to systematic exclusion of blacks from his jury prior to *Peters v. Kiff*, so too, this Court has never before considered a male's challenge to the systematic exclusion of women from his jury prior to the instant case. In this first case the Court should grant Petitioner a writ, reverse the decision of the Virginia Supreme Court and announce the rule that a man has standing to challenge the systematic exclusion of women from his jury.

Two important and emerging doctrines meet in this case. The first, of course, is the non-member standing rule of *Peters*, *supra*. The other is the growing recognition of sex discrimination as forbidden by the Fourteenth Amendment. *Reed v. Reed*, 404 U.S. 71(1971); *Frontiero v. Richardson*, 411 U.S. 677(1973); *Celevland Board of Education v. La Fleur*, 94 S.Ct. 791(1974. Here, curiously enough, a male suffers the sex discrimination complained of. Were the Petitioner a woman, the Commonwealth of Virginia would not dispute that Petitioner would have standing to raise the issue of jury selection which is

the subject of this attack. Because Petitioner is a male, he was not permitted by the Virginia courts to raise the issue. There is no valid reason for this distinction.

Granted Standing, Petitioner Should Prevail on the Merits

Once it is conceded by the retroactive application and construction of *Peters v. Kiff* or by the announcement of a new rule from this case of first impression that Quick is entitled to raise the sex discrimination question, we must turn our attention to the merits of the claim. On the merits, the case is plainly made. At the time of Quick's trial in 1970, the population of Nelson County was approximately 50% women. The Nelson County jury commissioners for 1970 were all males. Of the grand jurors who indicted Quick, all six were males. Of the venire summoned to Quick's trial, only three of twenty-eight persons were female. And of the twelve jurors who tried Quick, all were male. The disparity is severe and this is plainly a showing of discrimination. The Commonwealth bears the burden of refuting it and, having failed to do so, the Petitioner is entitled to relief. *Stephens v. Cox*, 449 F.2d 657(4th Cir. 1971).

CONCLUSION

For the reasons set forth above, this Petition for Certiorari should be granted.

Respectfully submitted

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June 2, 1974

MAILING CERTIFICATE

I hereby certify that on or before the 2nd day of June, 1974, I mailed three true copies of the foregoing Petition for Writ of Certiorari to The Honorable Andrew P. Miller, Attorney General of Virginia, Supreme Court Building, Richmond, Virginia, and three copies to Robert E. Shepherd, Jr., Esquire, Assistant Attorney General, Life of Virginia Building, Richmond, Virginia.

/s/ John C. Lowe
John C. Lowe
Attorney for Petitioner